

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

General Pet Supply, Inc.)	Opposition No. 91158622
)	
Opposer)	Reg. No.: 76/435630
)	
v.)	Mark: OURCAT'S CHOICE LITTER
)	
OurPet's Company)	Filing Date: July 29, 2002
)	
Applicant)	Applicant's Answer
)	
)	

CERTIFICATE OF MAILING

I hereby certify that this correspondence is being deposited with the United States Postal Service on the date shown below with sufficient postage as first class mail in an envelope addressed to: Box TTAB No Fee, Commissioner for Trademarks, 2900 Crystal Drive Arlington, VA 22202-3513

Name: John D. Gugliotta

Date: 2/18/05

Assistant Commissioner for Trademarks
2900 Crystal Drive
Arlington, VA 22202-3513
ATTN: BOX TTAB

Dear Sir:

APPLICANT'S MAIN BRIEF

I. Introduction

Applicant's OurPet's Company is the owner of approximately a dozen registered trademarks and many more applications for innovative pet products, most of which are protected by U.S. Patents. Currently, OurPet's company sells a patented, non-clay based cat litter as part of their overall product mix. Applicant filed for an intend-to-use application for "OurCat's Choice Litter" and "Nature's Litter" during development of this product, and has since marketed and



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sold under the mark "OurCat's Choice Litter", which was approved by the Patent and Trademark Office. Further, the formulation is protected by U.S. Patent No. 6,817,315.

II. Relevant Facts

The opposer in this case has not indicated any single instance of actual confusion, but bases their entire opposition on a theoretical 'likelihood of confusion'. In over a year of both products sharing the same alleged 'market space', such a glaring absence of any confusion to anyone is striking. The examining attorney has thoroughly considered the issue of confusion between the Opposer's mark and the Registrant's mark. The examining attorney has indicated that the applicant's mark does NOT create the same overall impression as the registrant's mark and that the goods are NOT identical. Applicant expressly denies allegation that registration of "OURCAT'S CHOICE LITTER" is likely to cause confusion, mistake, or deceive the relevant consuming public. Applicant expressly denies allegation that registration of "OURCAT'S CHOICE LITTER" is used for identical goods to Opposer's use.

III. Applicant's Arguments.

A. Likelihood of Confusion

The examining attorney had initially refused registration on the Principal Register because the examining attorney believed the present mark is confusingly similar to "CAT'S CHOICE" (Reg. No. 1,798,855).

However, after this cursory rejection, the examiner made a more thorough and complete analysis, and reversed this initial showing of likelihood of confusion, indicating that applicant's mark does not create the same overall impression as the registrant's mark and that the goods are

not identical. This thorough and complete analysis was conducted as set forth in T.M.E.P. § 1207.01, where the test for likelihood of confusion under Sec. 2(d) is given, showing that one must consider the following:

- (1) *The similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression;*
- (2) *Similarity or dissimilarity and nature of the goods or services as described in an application or registration or in connection with which a prior mark is in use;*
- (3) *The similarity or dissimilarity of established, likely-to-continue trade channels;*
- (4) *The conditions under which and buyers to whom sales are made, i.e. "impulse" vs. careful, sophisticated purchasing;*
- (5) *The fame of the prior mark (sales, advertising, length of use);*
- (6) *The number and nature of similar marks in use on similar goods;*
- (7) *The nature and extent of any actual confusion;*
- (8) *The length of time during and the conditions under which there has been concurrent use without evidence of actual confusion;*
- (9) *The variety of goods on which a mark is or is not used (house mark, family mark, product mark).;*
- (10) *The market interface between the applicant and the owner of a prior mark;*
- (11) *The extent to which applicant has a right to exclude others from use of its mark on its goods;*
- (12) *The extent of potential confusion, i.e. whether de minimis or substantial; and*
- (13) *Any other established fact probative of the effect of use.*

Applicant restates the previous arguments herein. As to item (1), the applicant asserts that there is a distinct difference in appearance, sound, connotation and commercial impression between the applicant's mark and the registrant's mark. The registrant's mark is the two-word phrase "Cat's Choice". The applicant's mark is the three or four-word phrase "OurCat's Choice Litter", and is distinguishable over the registrant's mark by the inclusion of "Our" and "Litter", respectively. Furthermore, the applicant's mark contracts "Our" and "Cat's" into a single word, also distinguishing the applicant's mark from the registrant's. Because of the differences distinguishing the applicant's mark from registrant's mark, applicant asserts that factor (1) favors applicant.

As to items (2) and (3), the applicant's product is a patented, non-clay based clumping cat litter, whereas the opposer cannot claim any such features that would put their product into this premium niche. However, assuming arguendo that the goods are identical and that the channels of trade are similar, only items (2) and (3) favor the registrant and do not provide a total weighing of the necessary 13 part test.

As to item (4), the applicant asserts that cat litter is not an "impulse" buy, and therefore requires a specific level of sophistication. Because of this sophistication, there likelihood of a consumer confusing the applicant's product and mark with the registrant's product and mark is reduced. Therefore, factor (4) favors applicant.

As to item (5), the fame of registrant's mark appears to be minimal. An Internet search (via Google and Yahoo) for "Cat's Choice" did not provide a single "hit" for such a trademark and associated product. A search of the registrant's website (www.generalpet.com) provided no information about the availability of "Cat's Choice" Litter. As such, it is reasonable to conclude that the registrant has achieved either no or minimal fame with the mark. In contrast, the

applicant's mark and product is presently available through PetsMart, DogToys.com, CatToys.com, PetCo (www.petco.com), Pet Supplies Plus (www.petsuppliesplus.com), Care-A-Lot Pet Supplies (www.carealotpets.com), Jeffers Vet Supply (www.jefferspet.com), JB Wholesale Pet Supplies (www.jbpet.com), and Drs. Foster and Smith (www.drfostersmith.com). As such, the applicant asserts that factor (5) favors the applicant.

As to item (6), a search of the USPTO database revealed no other similar marks in use on similar goods. Coupled with the distinctiveness of applicant's mark from registrant's mark, as noted in item (1), applicant asserts that factor (6) favors applicant.

As to item (7), there is no evidence of any actual confusion, thus, factor (7) favors the applicant.

As to item (8), concurrent use has been occurring for more than one year without evidence of any actual confusion, thus factor (8) favors the applicant.

As to item (9), the applicant's mark is used only on the cat litter. In addition, the inclusion of "OurCat's" is a derivation or the parent house mark of "OurPet's Co." and is deemed to be a family mark of "OurPet's", thereby further reducing any potential confusion and forming a strong association between the "OurPet's" brand of pet products and the "OurCat's Choice Litter". Applicant asserts that factor (9) favors the applicant.

As to item (10), the discussion that occurred in reference to item (5) above is incorporated by reference as if fully rewritten. There does not appear to be any overlap in the market interface between the marks and products. As such, applicant asserts that factor (10) favors applicant.

As to items (11), (12) and (13), applicant acknowledges the registrant's right to exclude others to use of "Cat's Choice" and similar marks, but asserts based on the numerous reasons cited above, that the applicant's mark and registrant's mark are not similar, therefore the

registrant has no right to exclude the applicant from use of applicant's mark. And, for the reasons cited above, the potential confusion between the marks is minimal. Therefore, factors (11) and (12) favor the applicant, and factor (13) is inapplicable.

As stated above and as set forth in T.M.E.P. § 1207.01, the test for likelihood of confusion under Sec. 2(d) must consider the preceding thirteen indicia. In reviewing these indicia, applicant notes that factors (1) and (4)-(12) favor the applicant for the reasons noted above. On balance, the majority of factors favor the applicant, and as such, places the trademark in a condition for allowance.

B. Dissimilarity of Products

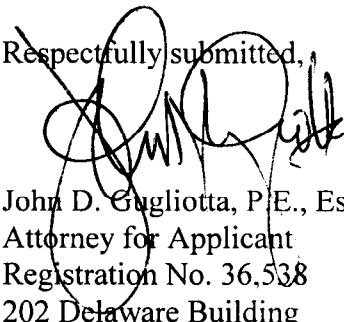
The cat litter industry is very segmented into a variety of litters that provide, alternately, either a very inexpensive but potentially hazardous clay-based litter, or a non-toxic and naturally safe, biodegradable, but extensive litter that has little dust. The inexpensive, clay based litters are a commodity, and represent the vast majority of the market, while the non-clay based litters are expensive, form particular niche markets, and are marketed and sold distinctly on the advantages in one litter formula over the other. *Because of a significant cost differential, the relevant public is VERY likely to make distinctions at the point of sale.* Applicant's product is inherently unique, as evidenced by the granting of U.S. Patent No. 6,817,315 to protect the unique formulation. This patentable difference, which allow for the feature such as odor reduction, clumping, and the absence of toxic-based clays, makes a significant difference to a pregnant woman who was told by her doctor to avoid clay-based cat litters for the health of her fetus.

IV. Conclusion

Applicant's registration of "OURCAT'S CHOICE LITTER" is highly unlikely to cause confusion, mistake, or deceive the relevant consuming public. Further, Applicant product sold under "OURCAT'S CHOICE LITTER" is not being used for identical goods to Opposer's use.

Although the examining attorney had initially rejected the currently application, after fully considered all of these facts, the examining attorney made the proper determination and reversed the initial decision, indicating that applicant's mark does not create the same overall impression as the registrant's mark and that the goods are not identical. This, along with the fact that no affidavit of actual confusion has ever been supplied, Registrant respectfully requests that the present Opposition to Registration be denied.

Respectfully submitted,

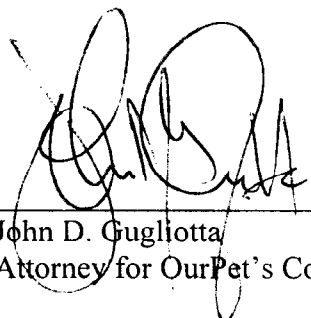


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Answer has been sent by regular U.S. Mail on
this 18 day of February, 2005 to:

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